Supreme Court, U. S.
FILED
FEB 21 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1289

SAKS AND COMPANY, ALFRED DUNHILL OF LONDON, INC. and FABER, COE & GREGG, INC.,
Cross-Petitioners,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA as Interventor,
Respondents,

ALONSO MENENDEZ, *et al.*,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
A. Post-Intervention Shipments of Cigars	5
B. Pre-Intervention Shipments of Cigars	5
C. Trademark Infringement	7
D. Interest	8
Reasons for Granting the Writ	8
A. The Conditional Nature of the Cross-Petition	8
B. Fairness Requires that this Court Consider All Arguments Advanced by Cross-Petitioners in Support of the Result Below	10
C. The Decision Below on the Importers' Defense of Payment Places an Unreasonable Burden on Debtors Who Seek to Make Payment in Satisfaction of Their Obligations	12
D. The Award of Interest on the Judgments Entered Against the Importers Was Improper	14
Conclusion	16

TABLE OF AUTHORITIES

PAGE

Cases:

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 8
Bank of China v. Wells Fargo & Union Trust Co., 209 F.2d 467 (9th Cir. 1953) 15
First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) 7, 8–9
Herzfeld v. National City Bank of New York, 175 Misc. 534 (Mun. Ct. N.Y. Co. 1940) 13
Johnson v. Donnell, 90 N.Y. 1 (1882) 12
Langnes v. Green, 282 U.S. 531 (1931) 10
LeTulle v. Scofield, 308 U.S. 415 (1940) 10
F. Palicio y Compania, S.A. v. Brush & Bloch, 256 F.Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967) 5, 14, 15
Ryerson v. United States, 312 U.S. 405 (1941) 10
Solomon Inc. v. Deutsch, 123 Misc. 247 (App. Term 1st Dep't 1924) 13
Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973) 14
United States v. American Ry. Express Co., 265 U.S. 425 (1924) 10
United States v. Raines, 362 U.S. 17 (1960) 10
Wangner v. Grimm, 169 N.Y. 421 (1902) 13

Statutes:

N.Y.C.P.L.R. §5001 14
28 U.S.C. §1254(1) 2
28 U.S.C. §1332(a)(2) 4
28 U.S.C. §2361 15

Other Authorities:

77 C.J.S. Sales §237(b) 12
43 N.Y. Jur. Payment §27 ..... 12, 13

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 24, 1973. We ask, however, that the writ issue only if this Court should grant the petition for a writ of certiorari filed on behalf of the Republic of Cuba.

Opinions Below

The opinion of the Court of Appeals (Joint Appendix pp. 1a-38a)* is reported at 485 F.2d 1355 (2d Cir. 1973). The opinion of the District Court (Joint Appendix pp. 41a-75a) is reported at 345 F.Supp. 527 (S.D.N.Y. 1972).

Jurisdiction

The judgment of the Court of Appeals was entered on September 24, 1973. A timely petition for rehearing and suggestion for rehearing *en banc*, filed by Alfred Dunhill of London, Inc., was denied on November 14, 1973 (Joint Appendix pp. 39a, 40a). By order dated December 20, 1973, Mr. Justice Marshall extended cross-petitioners' time to file a petition for a writ of certiorari until February 21, 1974. (The time of the Republic of Cuba to file a petition for a writ of certiorari also expires on February 21, 1974. We are advised that such a petition will be filed.) This Court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented

In the event that the Court should grant the Republic of Cuba's petition, we respectfully request that the Court also agree to review the questions noted below. The Court will thus have before it all of the interrelated issues con-

* References to the "Joint Appendix" refer to the single Appendix filed by cross-petitioners in support of this petition, by Alfred Dunhill of London, Inc. in support of its petition for a writ of certiorari and by the Republic of Cuba and Daniel Solano Pinera in support of their petition for a writ of certiorari.

cerning the correctness of the judgment of the Court of Appeals.

Specifically, cross-petitioners seek review as to two matters:

1. If importers of Cuban cigars, in the normal course of business, continue to make payments—after intervention* of certain cigar manufacturing companies by the Cuban government—for shipments of cigars shipped prior to intervention, do these payments satisfy the importers' obligation to the former owners of the cigar manufacturing companies?

2. If importers of Cuban cigars, subjected to conflicting claims from two claimants which would result in double liability, have no safe means for discharging their obligations and are unable for six years to obtain jurisdiction over a foreign state which is one of the two claimants, is it proper to award interest to the two claimants on their respective money recoveries?

Statement of the Case

On September 15, 1960, the Cuban government intervened the properties of certain Cuban cigar manufacturing companies, and began operating them for the benefit of the Cuban government. Prior to intervention, and for a short time thereafter, three United States companies, cross-petitioners Saks and Company ("Saks"), Alfred Dunhill of

* "Intervention" is a process, under Cuban law, by which Cuban officials seize control of privately owned properties and continue to operate them for the benefit of the Cuban government. To some, "confiscation" might be a more appropriate description of the process.

London, Inc. ("Dunhill") and Faber, Coe & Gregg, Inc. ("FC&G") [hereinafter referred to as "the importers"] purchased cigars from the Cuban factories for distribution and sale in the United States.

Because normal credit terms in the trade ranged up to 90 days, the importers did not pay for many of the pre-September 15 shipments, until after that date.

In addition, in early 1961 the importers ceased paying for any post-September 15 shipments after the owners asserted that they—and not the interventors—were entitled to be paid for those post-intervention shipments.

This relatively simple set of facts has generated 13 years of litigation among the importers, the former owners of the cigar factories (all Cuban nationals) ("the owners") and the interventors.*

This action is a consolidation of nine separate actions commenced by the owners against the importers between February and September 1961.** Some six years later, in

* The interventors are officials of the Cuban government who manage the cigar manufacturing companies.

** The jurisdiction of the District Court was invoked under 28 U.S.C. §1332(a)(2), all parties except the importers being foreign states or citizens or subjects thereof.

The owners who instituted these actions are Alonso Menendez, Jose M. Garcia, Benjamin Menendez, Jose Menendez and Adolfo Garcia, co-partners, doing business under the firm name and style of Menendez, Garcia y Compania, Limitada and Menendez, Garcia y Cia., Ltda. and Menendez y Garcia; Rafael Cifuentes, Ramon Cifuentes and Manuel Cifuentes, co-partners, doing business under the firm name and style of Cifuentes y Compania; Por Larranaga, Fabrica de Tabacos, S.A.; and F. Palicio y Compania, S.A. Each of the importers was sued by each of the owners, except for Saks which was sued only by Menendez y Garcia.

May, 1967, the interventors were granted permission to intervene following the decision in *F. Palacio y Compania, S.A.* v. *Brush & Bloch,* 256 F.Supp. 481 (S.D.N.Y. 1966), *aff'd,* 375 F.2d 1011 (2d Cir.), *cert. denied,* 389 U.S. 830 (1967). In *Palicio,* the District Court held that, as between the owners and the interventors, the latter were entitled to recover against the importers for the value of post-intervention shipments.

A. Post-Intervention Shipments of Cigars.

In this action, the District Court adjudged that the importers were obligated to the interventors for shipments of cigars made from the factories in Cuba *after* September 15, 1960.

The Court of Appeals affirmed the judgment of the District Court as to these post-intervention shipments, and the importers do not raise any issue with regard to their liability for these shipments.

B. Pre-Intervention Shipments of Cigars.

In July, August and September, 1960, and through the close of business on September 15, 1960, the owners made shipments of cigars to the importers. As we noted before, because normal credit terms for payment in the trade ranged up to 90 days, the importers did not pay for many of these shipments until after September 15, 1960.

After September 15, 1960, the importers paid for pre-intervention shipments in accordance with the regular practice prior to September 15, 1960. Checks were delivered to collecting banks in New York in accordance with the

importers' obligations under trade acceptances previously executed by them; or checks were delivered to the factories in Cuba in accordance with the regular course of business between the parties. These payments were made with the knowledge of the owners who offered no protest to the continuance of payments in accord with pre-September 15 practice.

At trial, the owners testified that they never received any of the proceeds of the payments made by the importers after September 15, 1960. The interventors' counsel admitted receiving some of the proceeds, but disclaimed any knowledge as to the balance. The interventors, however, offered no live witnesses on this point and failed to produce any books or records, although asked to do so.

The District Court reached the following conclusions as to pre-intervention shipments:

(a) the owners were entitled to the invoice price of pre-intervention shipments;

(b) the payments made by the importers for these shipments after September 15, 1960, did not, as a matter of law, constitute payment to the owners—hence the importers remained liable to the owners for pre-intervention shipments;

(c) the interventors received the payments made by the importers for pre-intervention shipments; and

(d) as a matter of law, the importers were entitled to recover from the interventors the amounts received by the interventors on account of pre-intervention shipments.

The Court of Appeals affirmed in all respects, except as to the amounts the importers were entitled to recover from the interventors on account of pre-intervention shipments. As to this point, the Court below, applying the act of state doctrine and *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), held that the amount of each importer's recovery was to be limited by the amount recovered by the interventors against that importer on account of post-intervention shipments. Thus, the importers were entitled to a set-off, up to the amount of the interventors' recovery. FC&G and Saks were not affected by this modification, since the amount of the interventors' judgments against each exceeds the amount of the judgment obtained by the owners. However, the District Court awarded Dunhill an affirmative judgment against the Cuban government for the excess of Dunhill's payments for pre-intervention shipments over the amount Dunhill was obligated to pay to Cuba for post-intervention shipments. The Court of Appeals reversed the District Court on this issue and held Dunhill was not entitled to an affirmative judgment. Dunhill sought rehearing and rehearing *en banc* in the Court below, which applications were denied. Dunhill intends to file a separate petition for a writ of certiorari in this Court on that issue. The present cross-petition is therefore limited to other issues of joint concern to all the importers.

C. Trademark Infringement.

The District Court and the Court of Appeals both ruled that the trademarks under which the cigars were sold were the property of the owners, but that the owners were not entitled to relief against either the interventors or the

importers on their claims of trademark infringement and unfair competition.

Cross-petitioners do not seek review of this aspect of the judgment below.

D. Interest.

The Courts below awarded prejudgment interest to the interventors on the amounts due for post-intervention shipments from the date of commencement of the *Palicio* suit on June 28, 1961. This award was made notwithstanding the fact that the importers were potentially subject to the imposition of double liability for the value of those shipments. Not until the Cuban government's intervention in this action on May 16, 1967, did the importers have any remedy available to them by which they could safely discharge their obligations without the risk of double payment.

Reasons for Granting the Writ

A. The Conditional Nature of the Cross-Petition.

As we have noted, this cross-petition is conditional in nature, we pray for the issuance of a writ of certiorari only in the event that the petition filed by the Republic of Cuba and the interventors, in this case, is granted. Assuming that there was an act of state in this case, cross-petitioners believe that, except as to one issue which affects Dunhill, the Court of Appeals correctly applied this Court's decisions in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) and *First National City Bank* v. *Banco Nacional*

de Cuba, 406 U.S. 759 (1972) to the facts of this case.* For this reason, the importers will file a brief in opposition to the petition for a writ of certiorari that they expect to be filed on behalf of the Republic of Cuba and the interventors. If the Republic of Cuba's petition is denied, and the decision of the Court of Appeals is permitted to stand, then, with the exception of the special issue concerning Dunhill already noted, the importers will not have been subjected to any double liability.

However, if the interventors' petition is granted, and the Court undertakes to review the validity of the importers' offset against Cuba, we respectfully request that the Court also review the Court of Appeals' determination that the importers remain liable to the owners for pre-intervention shipments.

The two questions are interrelated—if the Court should find that the importers have paid the owners, then the issue of the validity of the importers' offset becomes moot. However, if the Court should deny the validity of the offset without also considering the issue of payment, the importers will be subjected to double liability—contrary to all principles of equity and fairness.

Thus, if the Court grants the Republic of Cuba's petition, the importers pray that this cross-petition also be

* In its separate petition, Dunhill adopts the position that there was no act of state in this case, and that, therefore, the Court of Appeals erred in reversing the affirmative judgment accorded to Dunhill by the District Court. While Saks and FC&G intend to assert this defense on the merits if the petition for a writ of certiorari filed by the Republic of Cuba is granted, the instant cross-petition is not addressed to this issue.

granted, so they may be heard on the issue of their defense of payment.

The interest issue involves an area of intersection between state and federal law. If the Court grants the Republic of Cuba's petition, the interest issue can be briefed and decided with little additional effort by the Court and counsel.

B. Fairness Requires that this Court Consider All Arguments Advanced by Cross-Petitioners in Support of the Result Below.

This Court has long held to the view that a respondent may urge any matter appearing in the record in support of a judgment. *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940); *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941); *Langnes* v. *Green*, 282 U.S. 531 (1931); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *cf.*, *United States* v. *Raines*, 362 U.S. 17, 27, n.7 (1960). Thus, ordinarily, the importers could raise their defense of payment, considered and rejected below, in support of the judgment of the Court of Appeals. However, this Court has also stated that "the appellee [respondent] may not attack the decree with a view either to enlarging his own rights thereunder *or of lessening the rights of his adversary.*" *United States* v. *American Ry. Express Co.*, 265 U.S. at 435. (Emphasis supplied.) Were this Court to reverse the judgment of the Court of Appeals, allowing the importers' counterclaims against the interventors, and also reverse that judgment insofar as it rejected the importers' defense of payment against the owners, then, though the obligation of the importers would remain un-

changed,* the rights of the interventors would be enlarged, and those of the owners diminished. Thus, though the importers seek to raise their defense of payment in support of the *result* below as to the amount of their liability, it may be that such a defense will constitute an attack on the *judgment* below as to the identity of the judgment creditor. If raising the payment issue is viewed as such an attack on the judgment below, then the issue can be presented for consideration by this Court only if this cross-petition is granted.

Considerations of fairness require that the importers be permitted to raise this defense if the Republic of Cuba's petition is granted. Were this a suit by the owners against the importers for the value of pre-intervention shipments, and had the Courts below rejected the importers' defense of payment while also dismissing the owners' claims on the ground that they were barred by an act of state, then as respondents before this Court, the importers could raise their payment defense (as well as the act of state defense) in support of the judgment below.

No different result should obtain in this case. By granting this cross-petition, this Court will be doing no more than permitting the importers to urge a properly preserved defense in order to avoid the imposition of double liability. The judgments below determined the amount of the importers' liability. The interdependent nature of those judgments should not be permitted to bar the importers from raising their defense of payment in support of that result.

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* With regard to Dunhill, acceptance of the payment defense would result in a benefit equal to the amount of the judgment against the interventors awarded to Dunhill by the District Court.

C. The Decision Below on the Importers' Defense of Payment Places an Unreasonable Burden on Debtors Who Seek to Make Payment in Satisfaction of Their Obligations.

The Courts below held that the importers' post-September 15 payments, for pre-September 15 shipments in the ordinary course of business, and in conformity with the established practice of the parties, did not satisfy their obligation to the owners for the value of those shipments. The decision was based on the erroneous view that the importers' knowledge of the fact of intervention required them to inquire of the owners whether they could continue to make payment according to the established practice. This decision was reached despite the fact that the owners were in the United States, met with the importers, and failed to request any change in the method of payment.

This result is counter to the established rule of law with respect to payment. According to the black letter rule set forth in 77 C.J.S. Sales §237(b):

> "Ordinarily, payment should be and it is sufficient, when it is, made to the seller or someone authorized by him to receive payment."

There are several legal theories which make this rule applicable to this case. First, if the New York banks were the agents of the owners, then payments to those banks discharged the importers' obligations, and constituted payment to the owners. *Johnson* v. *Donnell*, 90 N.Y. 1 (1882); 43 N.Y. Jur. Payment §27. Even if the fact of intervention rendered the banks no longer the actual agents of the owners, the evidence herein clearly shows that the banks

had apparent authority to accept payments to the owners. Payment to one having apparent authority is sufficient to discharge the obligations of the debtor. *Wangner* v. *Grimm*, 169 N.Y. 421, 429 (1902); 43 N.Y. Jur. Payment §27. Finally, the failure of the owners to advise the importers to change their long-established methods of payment estops the owners from claiming that the importers' obligations were not discharged, either by payments to New York collecting banks or directly to the factories in Cuba.

In short, payment by the importers—whether to New York collecting banks or to the factories—in accordance with the authorized method for making payments theretofore established between the owners and the importers constituted payment to the owners, particularly in light of the owners' failure to protest or to issue any directions to change the methods of payment. *See, Solomon Inc.* v. *Deutsch*, 123 Misc. 247 (App. Term 1st Dep't 1924); *Herzfeld* v. *National City Bank of New York*, 175 Misc. 534 (Mun. Ct. N.Y. Co. 1940).

It would wreak havoc, we submit, with ordinary commercial transactions, if a creditor, having established a method for receiving payments, but knowing that because of some changed circumstance he will no longer receive payments under that method, is able to sit by, allow the debtor to make the payments and then claim that he was not paid. In these circumstances, the debtor's knowledge, whatever it may be, should not be decisive. The obligation belongs to the creditor to take some affirmative action to advise the debtor that payment under the established practice will no longer be payment to the creditor.

D. The Award of Interest on the Judgments Entered Against the Importers Was Improper.

In awarding prejudgment interest, the Court of Appeals relied on its recent decision in *Spector* v. *Mermelstein*, 485 F.2d 474, 481 (2d Cir. 1973). That case, however, is distinguishable from the situation presented here, since there was no risk of double liability for Mermelstein. To the extent that the Court of Appeals suggested that Section 5001 of the New York Civil Practice Law and Rules allows no discretion on the part of the trial court in cases within its purview, we submit that the Court of Appeals was in error.

An award of interest does not depend simply on the fact that a person—though obligated to pay a debt—has not paid it. The obligation to pay interest arises when the debtor refuses to acknowledge his debt and *wrongfully* withholds the money due.

In this case, the importers have never refused to acknowledge their debts—they have never wrongfully withheld the moneys due. They have always conceded that there are moneys due to someone. They have not paid the moneys due because, until the interventors appeared in this action after the *Palicio* decision in 1967, the importers had no safe means of paying, without subjecting themselves to the risk that they might have to pay twice. From the very beginning, in February, 1961, the importers have essentially occupied the position of stakeholders, without an effective method for discharging their obligation.

It is, of course, true that when a debtor exposed to double liability has available the remedy of interpleader as a means

of discharging his liability, and he does not avail himself of that remedy, he may be liable for interest. *Bank of China* v. *Wells Fargo & Union Trust Co.*, 209 F.2d 467 (9th Cir. 1953). But the *Wells Fargo* case is not controlling here. In *Wells Fargo*, the defendant bank had the remedy of interpleader available to it because: (a) the conflicting claimants —the Nationalist Chinese and the Chinese Communists— had both appeared in the action; and (b) the bank, having a sum of money on deposit within the jurisdiction which was the subject matter of the conflicting claims, could have commenced an interpleader action and obtained quasi-in-rem jurisdiction over all claimants, under a provision of California law.

In the case at bar, neither alternative was available to the importers. The interventors did not appear in this action until 1967, after this Court denied certiorari in *Palicio*. Until they appeared, there was no way for the importers to obtain jurisdiction over them in an interpleader action (even under the liberal service provisions of the Federal Interpleader Act 28 U.S.C. §2361).

Under these circumstances, it was improper for the Courts below to require the importers to pay prejudgment interest, at least for the period prior to May 16, 1967. The thrust of this decision is counter to the purpose of the interpleader statute, which is designed to protect stakeholders, like the importers, from the imposition of multiple liability.

Conclusion

For the foregoing reasons, in the event the Court should grant the petition for a writ of certiorari filed in this case on behalf of the Republic of Cuba, this cross-petition for a writ of certiorari should likewise be granted.

February 21, 1974.

Respectfully submitted,

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